UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CO2 DESIGN GROUP, INC., a California corporation; and COCO BENOUAICHE, an individual, Plaintiffs, vs. HARRAH'S IMPERIAL PALACE CORPORATION, a Nevada corporation d/b/a HARRAH'S IMPERIAL PALACE HOTEL & CASINO; and DOES I through X, inclusive, Defendants.	2:10-cv-0053-KJD (LRL) **O R D E R**

Presently before the Court is Defendant's Motion to Dismiss (#12). The Court has considered Plaintiff's Response (##14 and 15) and the Reply (#16). Also before the Court is Defendant's Motion to Strike (#22), Affidavit of COCO BENOUAICHE (#21). The Court has also considered Plaintiff's Response (#23) and the Reply (#24).

FACTUAL HISTORY

Plaintiff, COS DESIGN GROUP, INC., rented a room for one of its employees at Defendant's hotel, the IMPERIAL PALACE HOTEL & CASINO, in Las Vegas, Nevada, checking in on August 26, 2007 with a scheduled check out date of August 29, 2007. The employee was attending a trade show and taking orders for Plaintiff's products. The orders were kept in the room Defendant had assigned to her, Room 4153. All of the orders for merchandise from the first two days of the show were stored and kept in that room, along with personal clothing and accessories. On the night of August 28, 2007, Plaintiff's employee left the room, returning during the early

morning hours of August 29, 2007. At that time, she discovered the key card, given to her upon check in, having been deactivated by Defendants, would not operate to unlock the door to the room. She then learned that Defendant had rented the room to another guest who had already checked in and was occupying the room. All of the orders, personal belongings of the employee and equipment of Plaintiffs' had been in the room when the employee left on the evening of August 28th and were no longer in the room and never located or returned by Defendant.

Plaintiff alleges, upon information and belief, that Defendant removed the items owned by Plaintiff and its employee, including the order forms which contained approximately $1.8 million in sales. Plaintiffs further allege that their business reputation has been damaged as evidenced by angry and irate letters to Plaintiff regarding Plaintiff's failure to fulfill orders placed at the show. Copies of eight of the 50-70 sales' orders were recovered directly from three affected customers who had placed orders totaling $250,693.00.

Following Defendant's Motion to Dismiss, based in part upon Defendant's claim that the threshold amount for diversity jurisdiction had not been adequately plead, Plaintiff filed an affidavit stating that from the few orders recovered, lost profits would have been $101,920.90. As noted, Defendant has objected to the affidavit and moved to strike same as a "sur-reply".

STANDARD FOR A MOTION TO DISMISS

In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." Wyler Summit Partnership v. Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Consequently, there is a strong presumption against dismissing an action for failure to state a claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.

Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff has pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

The Iqbal evaluation illustrates a two prong analysis. First, the Court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. Id. at 1949-51. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." Id. at 1951. If the allegations state plausible claims for relief, such claims survive the motion to dismiss. Id. at 1950.

DISCUSSION

Defendant moves to dismiss for lack of subject matter jurisdiction asserting Nevada's Innkeeper Statute, N.R.S. 651.010, which limits the liability of an owner to $750 for loss of any guest property not deposited in a safe or vault. Defendant also moves to dismiss Plaintiffs' claim for negligent infliction of emotional distress. However, that motion has been rendered moot by Plaintiff COCO BENOUAICHE's Notice of Voluntary Dismissal (#15).

The Motion to Strike should be denied. Plaintiff's assertion of a loss of $1.8 million in sales, along with damage to business reputation is sufficient to establish that the amount in controversy is reasonably certain to be over $75,000.00 in damages. Even a profit margin of only 5% would yield damages in excess of the threshold, without even considering the damage to business reputation as alleged by Plaintiffs. The affidavit is confirmatory that Plaintiffs' asserted claim of damages in excess of $75,000 is not, as alleged by Defendants, without basis in fact. As such, the affidavit is not tantamount to a sur-reply raising new matters. To strike and require Plaintiff to file an amended Complaint would be a waste of resources and unnecessarily delay the resolution of this action. Moreover, any deficiencies of the Complaint as to the amount of loss are

not such that it would appear to a legal certainty that the claim is really for less than the jurisdictional amount, even if the affidavit were not considered.

With respect to Defendant's claim that the Nevada innkeepers' statutory limit of liability of $750.00 would assure that Plaintiffs' claims do not meet the $75,000 jurisdictional threshold, Plaintiffs have correctly pointed out that this statute does not impose a statutory limitation on all claims by guests against innkeepers for loss of property which occurred on the innkeepers' premises, no matter what the circumstances of the loss might be. Nadjarian v. Desert Palace, Inc., 895 P.2d 1291 (Nev. 1995). To allow Defendants to use the inn keeper statute to protect against consequences of their own actions, as opposed to those of third parties over whom they have no control, would be to convert the statute from a shield into a sword. It would also encourage the kind of neglect alleged in this case. The allegations of the Complaint are sufficient that a reasonable jury could find that the hotel, in deactivating Plaintiff's hotel card and renting the room out to another person, took possession of Plaintiff's property and breached duties owed the guest. This is not a case where there is an allegation that the property was stolen by a third-party or even by Defendants' hotel employees. There would be no purpose in stealing orders for merchandise.

Based upon the allegations of the Complaint, a reasonable jury could find that Defendant took custody or control of the property in preparing the room to be rented to another guest of the hotel, notwithstanding that Plaintiff had rented the room for the night of August 28 and had the right to occupy it until check out time on August 29. A jury might reasonably infer that Defendant took possession and control over Plaintiff's property merely by denying Plaintiff access to the room. It is up to the Defendant to explain what happened to the property under the facts alleged.

CONCLUSION

Plaintiff has, in its Complaint, asserted factual allegations which, construed in the light most favorable to Plaintiff, raises its right to relief above the speculative level. Accordingly, Defendant's Motion to Strike (#22) and Defendant's Motion to Dismiss (#12) are **DENIED**.

DATED: February 8, 2011

Kent J. Dawson
United States District Judge